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The Usefulness of Which Rawls?

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exist? Or why is it soon to exist? Where did it come from? East Timor exists and will exist largely because of things that happened in the international community, not because of things that happened inside East Timor or inside Indonesia. If it were not for the existence, the attitudes, the assumptions, the moral preferences, the ideas and beliefs of people outside the immediate area, East Timor would not be in the situation that it currently is. And East Timor is far from the only example. Until very recently the Baltic States were not states. They were provinces of the Soviet Union. What makes a state start to exist? We can't simply take the existence of states or the existence of any other international actors as having some kind of independent validity outside of the social system, the legal system, and the political system that is present in existing international, non-domestic law.

Rawls is insufficiently critical in adopting assumptions that states existed before international society. Doing so ignores the important role that international law and society played in creating the states. This is not to say that the priority should be reversed. The process is dialectical. States form international law and society, but international law and society also form states. The process goes back and forth. That is how international actors come into existence. They are not created by God or found under cabbage leaves.

Any international lawyer would recognize that not all international actors are states. By beginning his analysis with statist assumptions Rawls builds statist structures right into his philosophical conclusions. Rawls' original position, from which he constructs his "law of peoples" is composed only of a group of states, making their own social contractarian analysis behind a veil of ignorance. That just is not how things are. The world is not composed only of states, or of "peoples," but also of people. There are non-governmental organizations, universities, human rights organizations, churches, mosques and many other institutions that have just as much independent validity internationally as states do, from a purely theoretical point of view. There is no reason

theoretically to start with states as the relevant actors. Or if there is a reason, Rawls does not provide it. The detailed attention that international lawyers have long given to these questions shows how very far ahead of Rawls they already are. There would be no point in applying Rawls' theory of justice to the international arena.

Lea Brilmayer
Yale University

"THE USEFULNESS OF WHICH RAWLS?"

Lea Brilmayer invites us to consider the usefulness of John Rawls' theory of justice for international law. Her paper is based on Rawls' essay *The Law of Peoples*, first published in 1993. Her paper and its conclusion, that there would be "no point" in applying Rawls' theory of justice to the international arena, reveal much disappointment in Rawls' efforts as represented by that essay. Coincidentally, Prof. Brilmayer's paper was delivered in the same year (1999) in which Rawls published a book-length treatment of the same subject, by the same name (*The Law of Peoples*) (hereinafter *TLOP*). Unfortunately, there is little in the book that would encourage Prof. Brilmayer - indeed, the book's argument follows closely that of the earlier, eponymous essay. For this reason, I shall treat Prof. Brilmayer's criticisms as equally applicable to the book.

I agree with the substance of most of Prof. Brilmayer's criticisms, *as they relate to TLOP*. However, I believe there are good reasons for considering Rawls' principal work, his theory of justice as fairness (JAF) developed in *A Theory of Justice (ATOJ)*, to in fact be quite relevant and useful to international law; in fact, I would argue that in *TLOP* Rawls does not really apply JAF to the international arena in at all, and that is its main shortcoming. For this reason, while I share many of Prof. Brilmayer's criticisms, and her disappointment, I reach a more optimistic conclusion as to the promise of Rawls' larger project for international law.

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Prof. Brilmayer's criticisms sort into two basic groups: criticisms of Rawls' assumptions, and criticisms of his methodology. Implicit in these two criticisms is, I believe, a criticism of his results as well. The criticism of Rawls' assumptions can be summarized by stating that the world Rawls assumes for the exposition of his theory is not the contemporary world we live in. This is not simply a case of philosophical abstraction in the service of elegance of argumentation: Rawls is wrong, in important ways, about the nature of contemporary global society, and in particular the nature of contemporary international law. Two illustrations suffice: first, the world does not in fact consist of largely self-sufficient states. In fact, global economic interdependence is a highly visible, much-discussed feature of contemporary global life. As early as 1979, Rawlsian commentators were pointing this out, and in the process noting important philosophical implications of this fact for international application of Rawls' theory. (See, e.g. Charles Beitz, *Political Theory and International Relations* (1979)). Second, contemporary international law is not exclusively, or even some would argue, primarily, about states and their inter-relations. On the contrary, contemporary international law recognizes the fundamental role of the individual and her basic human rights in the constitution of international law, and the vital role played by NGO's and other non-state actors in shaping international policy and discourse.

I believe that these criticisms are well founded. I also agree with Brilmayer's characterization of Rawls as fundamentally concerned with methodology, a concern (if not obsession) which characterizes much contemporary philosophy. Rawls in particular must be careful on methodological matters, precisely because his aims extend far beyond methodology to substantive moral and political positions, thus rendering him particularly vulnerable to methodological attacks. In particular, Brilmayer objects to two aspects of Rawls' methodology in *TLOP*: the priority he places on the construction of domestic justice prior to the elaboration of international justice, and his construction of international justice

exclusively on the basis of the choices of states. She also makes the third, implicitly methodological criticism, that Rawls does not adequately justify the principles of international justice he identifies as constituting the law of peoples - they are merely "tossed off."

I think Brilmayer's third methodological criticism goes to the heart of the deficiencies in *TLOP*. I would restate this point in Rawls' own terms as a criticism that he fails in *TLOP* to follow the procedure of reflective equilibrium so critical to his work in *ATOJ*. In other words, he fails to establish that the principles of international law he begins with reflect our moral intuitions concerning international relations, and that the principles of international justice he arrives at reflect our considered judgment about these moral intuitions, following a process of critical reflection, evaluation and adjustment. Instead, he merely takes as representative of international law a rather dated set of general international legal principles from Brierly's *The Law of Nations*, and asserts that these principles would in fact be chosen as principles of international justice. He does, nevertheless, *explain* the choice of these principles in a manner reminiscent of his argument in *ATOJ*, involving the now-familiar devices of an original position, the veil of ignorance, and representative individuals.

In important respects, however, the approach Rawls uses in *TLOP* is not the same approach as in *ATOJ* - the words are similar, but the substance is not. Rather than present detailed arguments as to why representatives in the original position would choose his principles of international justice over other competing principles, he merely asserts that they would, and admits as much: "Thus, in the argument in the original position at the [international] level I consider the merits of only the eight principles of the Law of Peoples.... *** [t]he representatives of well-ordered peoples simply reflect on the advantages of these principles of equality among peoples and see no reason to depart from them or to propose alternatives." (*TLOP* 41).